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STATE AND PROVINCIAL REGULATIONS WITH CROSS-BORDER IMPACT

James Southwick^{*}

Thank you very much. I am very pleased to be invited to this conference.

When I was asked to come and talk about the case on Walleye in Lake of the Woods, I very much wanted to do so, but I tried to stop and think; we have a gathering here of some of the leading minds in U.S./Canada relations and international trade and it is very fun to talk about the fish case, but what is actually interesting about the fish case to an academic audience?

I thought, well, it is not so much that this was a case against a provincial measure. There have been, of course, many cases in the past that involved state or provincial measures; like the beer cases and the Massachusetts Burma case.

On the other hand, this case is an example of something we have been talking about the last couple days, which is that the extension of some of international trade agreements into new areas, such as services, increases the likelihood of cases. This case was brought on a trade and services provision. The U.S. filed a petition both under the General Agreement on Trade in Services (GATS) and filed a petition to United States Trade Representative (U.S.T.R.) to bring a case both under the GATS as well as the North American Free Trade Agreement (NAFTA) Trade in Services Chapter. The fact there were now trade in services provisions under which to litigate allowed us to bring the case. But this is a rather straight-forward observation that does not merit an entire speech.

As a third possible angle, I considered that some have portrayed this case as a unique example of a dispute between a state and a province, Minnesota versus Ontario. That is not really the case. It was a case about a petition by private industry in Minnesota that was acted upon by the U.S. federal government. Of course, there was very strong political support from the state government in Minnesota. That was very important to the case, but that is not all that unusual. It is usual for the local political interests to be rallying behind the local industry in a trade dispute. So, I do not really think that this can be billed as a state versus provinces case, groundbreaking in that respect.

^{*} Southwick bio.

I thought the interesting story here is found when we look behind the law, the facts and the outcome of the case to understand the underlying political/economic dynamics. The interesting thing is the underlying political story, and specifically how the politics of federalism both in the U.S. and Canada were a critical dynamic in this case.

This case was a dispute over the economic use of a shared border resource, the Walleyed pike, as we call them in the U.S., or pickerel, as they are called in Canada, that swim in the fresh water lakes and rivers which form the entire border between Minnesota and Ontario.

On both sides of that border, in that region, tourism associated with the use of those lakes and catching those fish is among the most, if not the most, important industry. The guests and the lodges on both sides of the border, in very large proportion, are from the U.S. The lodges were very much competing for the same clientele and, of course, the distance between them is a matter of a few miles.

These anglers like to have access to the whole lake. On the Canada side the characteristics of the lakes are different, some days it is better to fish over there and there is also an attraction, it is nice to fish in Canada; it is what you go up north for, to fish in Canada, so that is an important part of the business.

Over a period of years there began to emerge some sentiment, as we understand it, on the Ontario side that if fishermen from the U.S. were going to come and harvest the resource on the Canadian side, then they ought to be paying for it in the sense of spending money on the tourism economy in Canada. Put another way, there was some emerging sentiment that perhaps there were too many fish being taken from the lake and if you need to cut back, what better group to target than those who are coming over from the U.S., just for the day and not spending any money on the tourism industry?

Minnesota businesses and officials, generally, did not dispute the basic concept that Ontario has the right to regulate its fishery and to impose catch limits and charge license fees, but the idea the regulation ought to be tied to where one spends their tourism money was really the nub of the issue.

I think there was a sentiment among the Ontario Ministry of Natural Resources that there was not adequate enforcement of the limits.

On the U.S. side, the Minnesota Department of Natural Resources thought there really was not a problem in the health of the fisheries on either side of the border, but if Ontario really believed that too many fish were being caught, Ontario ought to look at its commercial netting. Minnesota long ago eliminated commercial netting, but on the Ontario side commercial netting was taking eighty percent of the fish in some of the most heavily used areas.

All these issues were percolating, but the nub of the issue, from the Minnesota side, was the link between spending the night in Canada and keeping your fish.

When Ontario imposed that rule on Lake of the Woods in 1998, it precipitated an immediate fifty percent drop in business in the northwest angle region of Minnesota that year, and it was very devastating to business.

So we filed our petition and we claimed violations of the national treatment principle under GATS Article 17 and NAFTA Article 1202.

This, obviously, was perhaps not the most economically significant case ever brought to the U.S. government. Certainly we knew that the Minnesota fishing resorts were not going to stand out as a very tall presence in front of the U.S.T.R., so we had to make up for that in some way. There were two things that were going to be critical if this case was going to succeed.

First, this had to be a strong case on the merits. Without any serious economic muscle or even with it, it is just critical to have that strong case on the merits. There are only eighteen or so lawyers at U.S.T.R. and they are not going to bother with you unless you can really demonstrate there is a good case.

Second, and most importantly, we had to make up for the lack of economic punch by delivering absolutely as much political resources into the case as we could, and this was the key. To put this back into the context of federalism, we really used the politics of federalism in the U.S. to our advantage in this case.

Fortunately, in the State of Minnesota, fishing is very close to an official state religion, and this problem received a lot of sympathy among Minnesota politicians. There had been a lot of history between Minnesota and Ontario working on this problem and it had been getting nasty for a number of years. Many Minnesota politicians had burned their fingers trying to deal with this, but when told there might be a way to bring this into the federal government's hands, to deal with under our trade agreements, there was very strong enthusiasm and support for it, including, very importantly, with Minnesota's brand new governor at the time, the high-profile, media-savvy, iconoclastic Jessie "The Body" Ventura. Governor Ventura weighed in, so to speak, on our request and joined on a letter to Ambassador Barshefsky, that was co-signed not only by the governor and attorney general and all of his cabinet and a good chunk of the Minnesota State Legislature, but also the entire federal congressional delegation of Minnesota, all urging Ambassador Barshefsky to take a look at this. At the same time, the Minnesota State Legislature began the process of introducing joint resolutions, encouraging the U.S. government to take up this issue. Also, soon thereafter the Minnesota Legislature began introducing sanctions legislation targeted at Canada, and specifi-

cally, targeting a main east/west line of the Canadian National Railway between Winnipeg and Thunder Bay, that goes south of Lake of the Woods and cuts across Minnesota for sixty-five miles. We thought there was some poetic justice in that this railway had gained access to that land resource in Minnesota in order to avoid going around the very lake on which Ontario was discriminating against Minnesota tourism businesses. Careful examination showed very slack environmental regulation of the railroad, unbelievable safety problems. Things like that were of a great deal of concern to the Minnesota legislature. We were hoping Toronto might take notice and start to raise the question: Do we care that much about Walleye as compared to the Canadian National Railway?

This effort to get the Minnesota State Government involved was critical and it worked for reasons that go to the politics of federalism in the U.S.

There are a lot of reasons why Ambassador Barshefsky needed a good relationship with the states. First, this very case showed there would be more and more disputes involving state measures. Second, there were negotiations to be carried out under various trade agreements to bind further state measures under the services, government procurement provisions, and, investment provisions of those agreements, where the cooperative relationship with the states was very important. But perhaps most importantly, on the negative side, she did not need the media-savvy, iconoclastic, newly-elected Governor of Minnesota bashing, which he is very good at doing, bashing her for failing to take action on a blatantly discriminatory measure. We actually had the governor pick up the phone and call her a couple of times, and she was not able to tell him no. So that got our case started.

The politics of federalism worked to our favor to get started, but then, once the case got up and going, we shifted to starting to have to deal with the politics of federalism in Canada, and it got very complicated from there.

Essentially, a four-way bargaining process emerged. U.S.T.R. would speak to the Canadian federal government and encourage them to work with the Ontario government to see if we could come to some resolution of this, emphasizing to Canada that this was, indeed, a serious matter, and the Canadian federal government needed to be involved and to intervene with Ontario.

Ottawa played a sort of good-cop-bad-cop routine, expressing sympathy to Washington, saying, "Yes, we understand it is a serious matter. It looks somewhat discriminatory to us, but, gee, what can we really do? Is not there something you can do with Minnesota, to try to bring this along?" So Ottawa would push back on Washington, and Washington would come and push back on the Minnesota government, saying, "Cannot you guys in St. Paul come up with something that will help make Ontario feel a little bit better?"

Ontario was taking the view with Ottawa that the dispute was not a federal government issue. Ontario would say, "This is our fishing regulation and you guys have nothing to do with this. If Minnesota has a problem, let Minnesota come talk to us." That would go back up the chain to Ottawa and over to Washington and back to Minnesota. Washington would say to Minnesota, "Cannot you guys just talk one on one with Ontario?" Minnesota said, "We cannot just talk one on one with Ontario. We have had a lot of experience talking one on one with Ontario, and we have no leverage in that situation." Eventually the U.S. government laid it on the line to Canada and Ontario: "These are your fish. These are your regulations. However, the way you are regulating your fish is a violation of the NAFTA." This was a very, very elaborate process that ultimately moved itself along to the point where Ontario did agree to what we called four-party talks.

The State of Minnesota, Province of Ontario sat in Washington and in Ottawa with the U.S.T.R. and Canadian Department of Foreign Affairs and International Trade officials, under the auspices of the NAFTA Dispute Settlement Chapter to talk about this matter, and we were able to reach a settlement in due course. Minnesota was able to offer to take some stronger enforcement measures and to reduce its fish-catch limits on Lake of the Woods, giving a nod to the concerns that Ontario had been raising about the limits and conservation. Ontario did decide to remove the requirement for a non-resident to stay in Canada in order to keep fish caught in Ontario waters.

So I understand from what I have heard, at least certainly on the Minnesota side, that the settlement is working well, and Minnesota actually reallocated a very significant portion of its enforcement resources to the border lakes, to make an earnest effort to show a good performance to Ontario in enforcement.

Business actually recovered almost instantaneously on the Minnesota side of the border. This was resolved in November 1999, and with the opening of the next fishing season in the next spring, business returned to normal for the Minnesota side.

I am hoping there will be this continued better spirit of cooperation among the fisheries officials and this will hold as a successful settlement. Thank you.

